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Towards the liberalisation of product placement on UK television?

Amandine Garde

Since February 28, 2011, product placement has been allowed in certain programmes on UK television. The liberalisation of product placement has given rise to vivid debates at both EU and national levels: if product placement may be an additional source of revenue for broadcasters, it may also be an insidious advertising technique, and this is considered in (I) of this article. The rules which have finally been adopted, and on which this article focuses, reflect the tensions and compromises that have been made (II), as well as the attempt to balance the free movement of services within the European Union and the need to ensure a high level of public health, consumer and child protection (III).

I From prohibition to liberalisation

Until February 28, 2011, product placement, which consists of the inclusion of a product or a service within a programme in return for consideration,¹ was prohibited on UK television, except in imported programmes and in films originally made for the cinema. The prohibition did not extend to prop placement, which does not involve the payment of any remuneration to the television service provider or the programme maker.²

As product placement is a potential source of revenue for broadcasters, the question arose at both national and EU level whether it should not be liberalised to support the competitiveness of the UK and the EU broadcasting industry. Thus, in December 2005, Ofcom launched a public consultation to gather the views of stakeholders on the issue.³ It received 67 responses which highlighted the absence of consensus on both the benefits and the risks such liberalisation would entail. As Ofcom found that the economic benefits of product placement were likely to be rather modest,⁴ and that further work was required to determine the pros and cons of liberalising product placement, it decided to postpone any changes to the UK regulatory framework to after the revision process to the Television Without Frontiers (TVWF) Directive⁵ was completed.⁶

Even though there were controversies regarding whether the TVWF Directive should be interpreted as prohibiting product placement in television programmes produced in the EU,⁷ the

general view was that product placement was banned as a result of the separation principle enshrined in the Directive that 'television advertising shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means'.⁸

During the consultation phase of the revision process of the TVWF Directive, the Commission argued that product placement should be allowed on two main grounds. Firstly, it claimed that the liberalisation of product placement would allow European audiovisual media services providers to obtain an additional source of revenue by which to bolster diminishing revenue streams and which would facilitate the production of better quality programmes.⁹ Secondly, the Commission argued that liberalising product placement would render European audiovisual media services more competitive in that it would minimise the problems associated with dual regimes in which product placement would be allowed in programmes originating from outside the EU but not in programmes originating from within the EU. Nevertheless, the liberalisation of product placement was not viewed favourably by all parties: several stakeholders which opposed liberalisation included not only public health and consumer associations, but also some Member States (not least northern countries and Germany). One argument against liberalisation is that product placement is unfair to consumers: firstly, because it has a more insidious influence than traditional forms of advertising insofar as viewers are not always aware of brand presence in the programmes they watch; and secondly, because it relates the product to the situation in which it is used and arguably constitutes a more aggressive marketing technique as a result.¹⁰

In December 2007, the Audiovisual Media Services (AVMS) Directive was finally adopted.¹¹ The AVMS Directive extends the scope of the TVWF Directive to all audiovisual media services, including the internet and on-demand services.¹² Article 11 deals exclusively with product placement. Nevertheless, it must be read in light of article 9 which contains the rules applying to all forms of audiovisual commercial communications.

Article 11 starts with a statement of principle prohibiting product placement.¹³ Immediately afterwards, however, it provides for derogations: product placement is allowed in a range of

programmes, on the conditions that certain requirements are respected and unless Member States decide otherwise.¹⁴ The AVMS Directive therefore liberalises product placement in certain programmes, while offering an option to Member States to opt-out and maintain the prohibition of product placement in all programmes. Nevertheless, the AVMS Directive contains exceptions: irrespective of the programme genres concerned, no product placement is allowed either in children's programmes or for tobacco products and medicines or medical treatments available only on prescription. Article 11 thus lays down a prohibition on product placement, followed by an exception to the prohibition, followed by an exception to the exception to the prohibition.¹⁵ The complexity of the mechanism established by the AVMS Directive, which is based on a clause of optional harmonisation, is further complicated by the fact that the AVMS Directive is also a measure of minimum harmonisation, which allows Member States to adopt more protective measures, subject to compliance with the general provisions of the EU Treaties, and in particular articles 34 and 56 of the Treaty on the Functioning of the European Union dealing respectively with the free movement of goods and the freedom to provide services in the EU.

In July 2008, the Department for Culture, Media and Sport launched a public consultation, seeking views on how the UK should implement the AVMS Directive. The Government received 59 responses, with 43 focusing specifically on product placement.¹⁶ On this basis, Andrew Burnham (the then responsible minister) issued a statement in favour of maintaining the existing prohibition, noting in particular that the consultation had failed to produce a convincing case for product placement. He pointed to the lack of sufficient evidence of economic benefits, along with very serious concerns about blurring the boundaries between advertising and content.¹⁷ Nevertheless, some 10 months later, his successor Ben Bradshaw effected a U-turn: 'We are now reconsidering the position. The Government is currently minded to permit product placement on UK television, subject to safeguards'.¹⁸ The Department for Culture, Media and Sport thus launched another consultation on November 26, 2009, three weeks before the deadline for the implementation of the AVMS Directive was due to expire.¹⁹ The Government received as many as 178 responses from a range of stakeholders,²⁰ and it is arguable that the significant mobilisation from the public and from the non-for-profit sector has allowed for the adoption of tighter restrictions than the Government seemed to have envisaged. The Audiovisual Media Services (Product Placement) Regulations 2010 were adopted on March 18 and entered into force on 16 April 2010 (the Regulations).²¹ They amend section 9 of Ofcom Broadcasting Code on commercial references featuring within television programming (the Code). Ofcom has subsequently published Guidance on these rules, which entered into force on February 28, 2011 (the Guidance).²²

II The regime for product placement on UK television

The second part of this article focuses on the rules which have been adopted in the UK as part of the implementation process of the AVMS Directive. In particular, it compares them with the rules laid down by the AVMS Directive, a measure of minimum harmonisation which, as such, allows Member States to adopt stricter provisions binding on broadcasters established on their territories.²³ The Directive sets conditions relating to the programmes genres (ii), the manner in which product placement can take place (iii) and the products placed (iv). Before discussing these three sets of rules, it is first necessary to consider the definition of product

placement (i).

(i) What is product placement?

The AVMS Directive identifies product placement as one form among others of audiovisual commercial communications. It consists in 'the inclusion of or reference to a product, a service or the trademark thereof so that it is featured within a programme, in return for payment or for similar consideration'.²⁴ Product placement therefore has two defining features: the product, service or trade mark must feature within a programme, and the reference must be in return for payment or for similar consideration.

This second requirement distinguishes product placement, which must comply with the rules laid down by the AVMS Directive as implemented in Member States, from prop placement, which is not required to comply with product placement rules. It is therefore necessary to determine what constitutes 'payment or similar consideration'. Recital 91 of the AVMS Directive states that 'the provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value'.²⁵ Thus, prop placement involving the supply of goods or services which are of 'significant value' shall be treated as product placement and must therefore comply with product placement rules. The question of determining whether value is 'significant' therefore entails important practical consequences.²⁶

According to Ofcom, 'significant value is when the value of a prop to the broadcaster, programme producer or a connected person is more than a trivial residual value, ie a value that is greater than the cost saving a broadcaster, programme producer or connected person has made as a result of acquiring the prop for use in the programme. For example, if a valuable prop was kept by a producer for personal use or re-sale it would have a residual value that was more than trivial. If a consumable low-value prop, like a food product, was retained, for instance, its "residual value" would be likely to be trivial'.²⁷ The wording employed by Ofcom is somehow more restrictive than the wording employed in the AVMS Directive: in the UK, 'significant' is defined as 'more than trivial'. Product placement could potentially cover a luxury watch or designer clothes. The decisions Ofcom has handed down on the meaning of 'remuneration' in this context confirm the broad scope of product placement rules. For example, in December 2009, the 'CNN YouTube Debate on Climate Change' was broadcast from Copenhagen, Denmark, during the period that the United Nations Copenhagen Climate Change Summit was being held. The programme consisted of videos which members of the public had uploaded via YouTube, to which various references were made throughout the programme as a result of a contractual arrangement requiring that CNN would display and integrate 'prominently' a range of visual references to YouTube within the programme, including its branding and logo. In return, Google undertook to promote the programme on the Google and YouTube websites, and provide the YouTube platform for viewers to submit their questions by video. The question arose whether this arrangement amounted to product placement. In May 2010, Ofcom found that it did: in exchange for the promotion of the programme, and the provision of the YouTube platform, CNN had agreed to provide Google and YouTube with extensive visual branding references during the programme. Ofcom ruled that this amounted to valuable consideration to the broadcaster, even though no money had changed hands.²⁸

Once the two defining conditions for product placement are fulfilled, the relevant rules apply. Neither the AVMS Directive

nor UK implementing rules specify who the beneficiary of the payment should be; it could presumably be anyone:²⁹ the key question is not ‘to whom?’ but ‘how much?’.

(ii) Conditions relating to programme genres

Article 11(2) of the AVMS Directive grants an option to Member States to allow product placement in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes.³⁰ By distinguishing programmes, the AVMS Directive implicitly recognises that independence from commercial interests is more important in some programmes than in others. Thus, news and current affairs programmes, which are not listed in article 11 of the AVMS Directive and which have as their primary purpose to inform rather than entertain, may not contain product placement.³¹

In implementing the AVMS Directive, the UK has exercised the option to liberalise product placement,³² though it has extended the list of programmes which may not contain such placement to include current affairs, consumer and religious programmes. This is true, even though such programmes may qualify as forms of ‘series’.³³ The UK decision to extend the list arguably supports the rationale that programmes whose purpose is not primarily to entertain should not contain embedded commercial references. As discussed in the third part of this article, however, one should note that the extension of the prohibition may only apply to programmes produced under UK jurisdiction, not to programmes imported from other jurisdictions.³⁴

Furthermore, rule 9.7 of the Code explicitly bans product placement in news programmes and in children’s programmes, even though these programmes may fall within the permitted genres. As regards news programmes, they are not listed as a possible exception to the prohibition on product placement listed in the AVMS Directive. It therefore seems that rule 9.7 simply clarifies, rather than adds to what the AVMS Directive allows. As regards children’s programmes, the AVMS Directive explicitly bans product placement in such programmes, notwithstanding the programme genre concerned.³⁵ If it is most welcome that the AVMS Directive recognises the particular vulnerability of children to commercial communications, it remains that the Directive does not define the key notions of ‘children’ and ‘children’s programmes’, leaving these definitions to each Member State. For the purposes of the product placement prohibition, ‘a children’s programme’ in the UK is ‘a programme made for a television programme service or an on-demand programme service, and for viewing primarily by persons under the age of sixteen’.³⁶ The threshold of 16 years old is relatively generous and therefore likely to reduce children’s exposure to product placement.

This being said, two concerns remain. Firstly, children’s programmes represent only around 30 per cent of the television to which children are effectively exposed.³⁷ One could therefore argue that, from a child protection point of view, the prohibition should be given an even broader remit and should target not only the programmes whose audience is made ‘primarily’ of persons of less than 16 years old, but also programmes with a high child audience. This would extend the prohibition to a range of family entertainment programmes attracting a mixed audience of both adults and children, such as ITV’s Pop Idol or Britain’s Got Talent or Channel 4’s Big Brother.³⁸ Secondly, and as noted above, neither the AVMS Directive nor the UK implementing rules prohibit prop placement. The determining factor to assess the scope of the prohibition on the presence of products, services or trademarks in children’s programmes is not whether

such presence is likely to influence negatively children’s consumption choices, but whether the broadcaster or programme maker is remunerated for the placement in the programme. This is all the more worrying, as several items which often appear in children’s programmes are not of ‘significant value’ and, as such, fall outside the scope of the prohibition. Unhealthy food features prominently among the products causing concerns for children’s health. Research has indeed established that the advertising of high fat, salt and sugar (HFSS) food on television impacts negatively on children’s dietary patterns and therefore constitutes a contributing factor to the ever growing childhood obesity epidemic. Notwithstanding these concerns, however, prop placement is allowed, subject to the requirement that it is not unduly prominent, as unequivocally confirmed by article 11(3)(b) of the AVMS Directive.³⁹ Whether the distinction between paid for and non-paid for product placement makes sense from the perspective of the viewer is another question, as the result is similar: references to brands and products during a programme’.⁴⁰ One may indeed doubt, as Lorna Woods has suggested, whether payment makes any difference in terms of consumer protection.⁴¹ In other words, would the impact on a child of the presence of unhealthy foodstuffs in a programme be any different depending on whether their appearance on screen was remunerated (product placement) or not (prop placement)? One may regret that both EU and national rules have failed to acknowledge this concern, particularly in relation to programmes targeting particularly vulnerable consumers.⁴²

For the sake of completeness, one should add that under the terms of the BBC agreement, all programmes made by the BBC, or an independent producer for broadcast on BBC licence fee funded services, must be free of product placement. Consequently, the BBC must not commission, produce or co-produce output for its licence fee funded services which contains product placement. In some cases, the BBC may broadcast a programme acquired from a third party which contains product placement, but it may only do so if it gets no financial benefit from the placement. In any event, the BBC may not acquire a programme from a third party on the condition that the product placement within the programme will be broadcast.⁴³ The BBC’s commercial television services are treated differently and may contain product placement (subject to Ofcom’s rules).

(iii) Conditions relating to the manner in which products may be placed

Article 11 of the AVMS Directive lays down a series of minimum requirements (‘at least’) with which all programmes containing product placement must comply. These requirements relate to the integrity of the programmes broadcasted (see (a) below) as well as the need to inform viewers of the presence of product placement in the programmes concerned (b)).

(a) The integrity of the programmes broadcasted

Article 11(3) of the AVMS Directive and UK implementing rules lay down three conditions which programmes containing product placement must fulfil and which are intended to uphold their integrity. Firstly, the AVMS Directive requires that the responsibility and the editorial independence of the media service provider shall remain unaffected. This is implemented in the UK by rule 9.8 of the Code which provides that ‘product placement must not influence the content and scheduling of a programme in a way that affects the responsibility and editorial independence of the broadcaster’.⁴⁴ This requirement is intended to ensure that programming is not driven by commercial interests. In particular,

broadcasters must not enter into commercial arrangements that impair, or appear to undermine, editorial judgments. This does not, however, prevent legitimate instances of product placement which necessarily involve contractual arrangements relating to references to products, services or trade marks in programmes. Simply, this must not take precedence over a programme’s editorial needs and the references to placed products, services or trade marks must be justified and the content is not distorted for the purpose of featuring them.⁴⁵

Secondly, the AVMS Directive requires that programmes containing product placement shall not directly encourage the purchase or the rental of the goods or services placed, in particular by making special promotional references to those goods or services. This rule is not particularly clear in that it does not define what ‘directly encourage’ and ‘special promotional reference’ mean. Its wording seems to suggest, however, that the inclusion or reference has to be accompanied by an additional message of encouragement or endorsement in order to reach the point of ‘directly’ encouraging the purchase or rental of goods or services.⁴⁶ UK implementing rules are arguably broader in scope: rule 9.9 of the Code provides that ‘references to placed products, services and trade marks must not be promotional’, without limiting the prohibition to ‘direct’ promotions.⁴⁷ This is confirmed by the Guidance which Ofcom has provided and which sets out a list of relevant factors to determine whether a reference is promotional, including: encouragement to purchase (whether direct or indirect); advertising claims; price or availability information; references (either explicit or implicit) to the positive attributes or benefits of the placed product; slogans associated with the placed product, service or trade mark; and/or endorsements (whether explicit or implicit).⁴⁸ Ofcom’s decisions confirm that it takes a broad view of the notion of ‘promotional references’. For example, in November 2010, it found that Channel Five had infringed the Code by broadcasting several episodes of the series *Family Food Fight*, which was sponsored by Flora and which contained frequent references to the health benefits of using low-fat spread as an alternative to butter. Even though the promotional references were implicit, in that they did not specifically refer to Flora in the programme, they were found to be in breach of Ofcom’s rules.⁴⁹

Thirdly, the AVMS Directive requires that programmes containing product placement shall not give undue prominence to placed products, services or trade marks. This is implemented by rules 9.10 and 9.5 of the Broadcasting Code, which further specify that two factors may be indicative of undue prominence:

- the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
- the manner in which a product, service or trade mark appears or is referred to in programming.

According to Ofcom, examples of format or storyline construction that could fall foul of the rules are likely to include:

- a reality format in which participants are required to perform tasks or challenges that feature strongly or frequently a placed product, service or trade mark; or
- improbable or contrived character or plot development, presenter behaviour, location, setting or other structural elements of a programme resulting from or linking to a product placement.⁵⁰

The decision which Ofcom handed down in February 2008 provides a good example of a reality format in which participants

are required to perform tasks or challenges that feature strongly or frequently a placed product, service or trade mark. During the TV series *Jamie at Home*, the British celebrity chef Jamie Oliver made repeated references to a kitchen utensil called the ‘Jamie Oliver’s Flavour Shaker’. The device which ‘crushes, grinds, mixes and more’, was featured on screen for two minutes as Oliver demonstrated how to make oregano oil. There were several close-up images of the product and Oliver referred to it twice by name. It was also featured in a later episode of the same series. Ofcom concluded that the references to the flavour shaker were unduly prominent, as ‘the focus on the product went way beyond the prominence usually given to a basic kitchen utensil’, and that by failing to apply appropriate compliance checks for *Jamie at Home*, Channel 4 had failed to maintain independence of editorial control over the programme’s content.⁵¹

Similarly, Ofcom may view as an example of improbable or contrived character or plot development the explicit reference to the Omega watch which James Bond wore in *Casino Royale* and which triggered the following dialogue with co-agent Vesper Lynd:

Vesper Lynd: ...You know, former SAS types with easy smiles and expensive watches. Rolex?

James Bond: Omega.

Vesper Lynd: Beautiful....’

If this reference had been made in a programme produced by or for a UK television broadcaster, the reference may well have been considered ‘unduly prominent’.⁵²

These three conditions overlap. However, as product placement is a form of audiovisual commercial communication, they cannot logically be interpreted as prohibiting the viewers’ exposure to, and therefore their awareness of, the products, services or trade marks placed in audiovisual media services. Rather, all three of them are intended to avoid the risk of abuse and draw the line between legitimate and illegitimate product placement by ensuring that ‘editorial content must not be created or distorted so that it becomes a vehicle for the purpose of featuring placed products, services or trade marks’.⁵³ Together, they set the limits and attempt to protect European programmes from excessive brand presence and therefore ensure a higher quality of audiovisual media services, whilst allowing audiovisual media services providers to benefit from a new stream of revenue. Broadcasters should exercise caution and always ensure that the placement is editorially justified, particularly when the placement is integral to the storyline/theme of a programme. In any event, they must always retain the right to amend, remove or obscure product placement references if they judge that these do not comply with the Code.⁵⁴

(b) The information of viewers

Another safeguard enshrined in the AVMS Directive is the requirement that ‘viewers shall be clearly informed of the existence of product placement’ and that ‘programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer’.⁵⁵ The requirement that viewers shall be informed of the presence of product placement gave rise to a lot of debates: as it lacks precision, it has been criticised both by consumer associations for its ineffectiveness and by industry operators for its lack of flexibility. In the UK, the Regulations left it to Ofcom

to lay down the conditions relating to the information of viewers. Rule 9.14 of the Code implements the information requirement laid down in the AVMS Directive, and on February 14, 2010, following another consultation of stakeholders,⁵⁶ Ofcom disclosed the two versions of the universal neutral logo which is now used to inform viewers of the existence of product placement on television and the rules surrounding its use.⁵⁷ In particular, the logo must be clearly visible and displayed for three seconds, and it must be neutral, without any references to the products, services or trade marks placed, in order to avoid their further promotion.⁵⁸ The Guidance nonetheless adds that ‘if broadcasters wish to provide viewers with a list of placed products, services or trade marks, they may do so in the end credits of the programme or by other means (for example, on a channel or programme website). However, if such information is provided in programme credits, to comply with rules 9.9 and 9.10 (no promotion; no undue prominence), this may only be done in a neutral, non-promotional manner, without the inclusion of any information about the placed products, services or trade marks (eg no brand slogans; advertising messages etc).’⁵⁹ Nevertheless, when a broadcaster acquires a programme containing product placement (ie neither the broadcaster nor a connected person has produced or commissioned the programme), the signalling requirement does not apply.⁶⁰ This is in conformity with the AVMS Directive which allows Member States, by way of derogation, to choose to waive the information requirement provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.⁶¹

Whilst television advertising is still subject to the separation principle,⁶² product placement is only subject to an identification requirement.⁶³ The identification requirement is one element distinguishing product placement, which is allowed provided it fulfils the conditions laid down in the AVMS Directive and national implementing rules, from surreptitious advertising, which is defined as ‘the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature’⁶⁴ and which remains prohibited.⁶⁵ If payment or similar consideration may indicate the broadcaster’s intention to mislead the public, this is not a precondition, as the European Court of Justice (ECJ) has most recently confirmed in its *Giannikos* judgment.⁶⁶ In this case, the Greek National Council for Radio and Television imposed a fine on a company operating a private TV channel and its chairman, Mr Giannikos, on the ground that a programme broadcast in 2003 presented a cosmetic dental treatment in three sequences, including information about the efficacy and the cost of the treatment, and had therefore contained surreptitious advertising. The company and Mr Giannikos challenged the fine, arguing that the provision of payment or of other consideration was a necessary condition for establishing the intentional nature of surreptitious advertising. The ECJ rejected this interpretation and ruled that it was clear both from the definition set out in the Directive and from its purpose and general scheme that the lack of such payment or consideration did not mean that such an intention could be ruled out.⁶⁷ In other words, the Directive only lays down a presumption, and the fact that no payment was made does not mean that there can be no surreptitious advertising. Interestingly, the ECJ also added that any other interpretation could deprive the prohibition on surreptitious advertising of its effectiveness, ‘given the difficulty, or even the impossibility, in certain cases of proving the provision of payment or of consideration of another kind for TV advertising which nevertheless

displays all the characteristics of surreptitious advertising’.⁶⁸ This last remark reinforces the argument that relying on a remuneration requirement to determine what falls within the scope of the AVMS Directive is fraught with practical difficulties.

(iv) Conditions relating to the products placed

The notion of ‘products’ is defined broadly in that it covers all products, services and trade marks. It is also irrelevant whether the products or services placed are branded or generic.⁶⁹

The AVMS Directive bans the placement of two categories of products, due to the specific risks their consumption entails for public health: firstly, tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;⁷⁰ and secondly, specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.⁷¹ Moreover, the AVMS Directive contains some (particularly weak) provisions regarding the promotion of alcoholic beverages and unhealthy food to children. In particular, ‘audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages’,⁷² and ‘Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children’s programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended’.⁷³ Notwithstanding the detrimental impact which the heavy marketing of alcoholic beverages and unhealthy food has on children’s consumption patterns, their diets and ultimately their health, the EU has not followed the recommendations of several stakeholders to ban such marketing.

In implementing these rules, the UK has used the discretion it has under the AVMS Directive to increase the level of consumer protection. Rule 9.11 reproduces the requirements of article 11(4) of the AVMS Directive by prohibiting:

- the placement of cigarettes and other tobacco products;
- the placement by or on behalf of an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products; and
- the placement of prescription-only medicines.

However, rule 9.13 extends the list by banning the placement, in programmes produced under UK jurisdiction, of:

- alcoholic drinks;
- foods or drinks high in fat, salt or sugar (HFSS);
- gambling;
- infant formula (baby milk), including follow-on formula;
- all medicinal products;
- electronic or smokeless cigarettes, cigarettes lighters, cigarette papers, or pipes intended for smoking; and
- any product, service or trade mark that is not allowed to be advertised on television (including guns, weapons and escort agencies).⁷⁴

By exceeding the minimum level of protection provided at EU level by articles 9 and 11 of the AVMS Directive, it is arguable that UK implementing rules strike a more refined balance

between competing interests: on the one hand, the liberalisation of product placement to allow broadcasters to dispose of new revenue streams, and on the other, the need to ensure a high level of public health and consumer protection.⁷⁵ One should note, however, that the effectiveness of national implementing rules is limited, firstly, by the fact that these products may legitimately be used as props,⁷⁶ and secondly, by the State of establishment principle.

III Conclusion: a satisfactory compromise?

The scheme set up by the AVMS Directive combines a clause of minimum harmonisation, which allows Member States to exceed the minimum standards set by the Directive,⁷⁷ with the State of establishment principle,⁷⁸ which prevents Member States from imposing their national implementing rules on audiovisual media services originating from other Member States.⁷⁹ This regulatory mechanism reflects the fact that the AVMS Directive is an internal market measure intended, in the first place, to ensure the free movement of services within the European Union.⁸⁰ Nevertheless, the AVMS Directive also acknowledges that free movement should not be detrimental to competing public interests, such as consumer, public health or child protection. The compromise therefore is that Member States may decide to impose stricter standards than the ones laid down in the Directive on the audiovisual media service providers established on their territories, without imposing these standards on providers established in other Member States.⁸¹ There is little doubt that audiovisual media service providers will benefit from the scheme thus set up, in that it allows them to transmit their programmes in the European Union without having to comply with more than one set of rules (ie, the rules in force in their State of establishment), thus offering them the opportunity to make significant savings in terms of compliance

costs. Nevertheless, the proper working of this scheme requires that each Member State should ensure that it has effectively implemented the AVMS Directive and that audiovisual media service providers comply with the rules in force on its territory.⁸² It also pre-supposes that the minimum standards established at EU level are sufficiently protective of the public interest.

In relation to product placement, it has been argued that the AVMS Directive has not struck an adequate balance between free movement and consumer protection imperatives. UK implementing rules, which are the outcome of a much more thorough consultation process, arguably achieve a better balance between free movement and competing imperatives of public interest. This is particularly visible in relation to the prohibition on the placement of certain goods and services, such as alcoholic beverages and HFSS foods, which are too weakly protected by regulators. Nevertheless, the fact remains that the scheme set up at EU level has fuelled the demands made by UK audiovisual media service providers on public authorities to ensure that they are not placed at a disadvantage over their European competitors whose States of establishment had made it public at a relatively early stage that they intended to liberalise product placement (without necessarily relying on convincing cost-benefit analysis).⁸³ As a result, only Denmark has elected to maintain a general prohibition on product placement. The AVMS Directive may lay down a prohibition of principle on product placement; the reality is that this form of audiovisual commercial communication has been largely liberalised in 26 of the 27 EU Member States.⁸⁴ The first review of the AVMS Directive is due for the end of 2011. It will be followed in 2012 by an assessment of UK rules in 2012. It is however unrealistic to expect a tightening of existing rules.

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Notes

- 1 The definition of product placement is discussed below.
- 2 Prop placement was allowed on UK television, provided that the presence of brands was editorially justified and not unduly prominent. The distinction between product placement and prop placement is still relevant following the entry into force of the new rules, as discussed below.
- 3 For the text of the 2005 consultation: see <stakeholders.ofcom.org.uk/binaries/consultations/product_placement/summary/product>.
- 4 The potential contribution product placement may deliver to commercial television in terms of direct financial contribution was estimated at between £25 and 40m per year.
- 5 Directive 89/55, OJ 1989 L298/23, as amended by Directive 97/36, OJ 1997 L202/60. An unofficial consolidated version of the TVWF Directive incorporating the 1997 amendments is available at: <eur-lex.europa.eu/LexUriServ/site/en/consleg/1989/L/01989L0552-19970730-en.pdf>.
- 6 Ofcom’s statement is available at: <stakeholders.ofcom.org.uk/binaries/consultations/product_placement/statement/statement.pdf>.
- 7 The TVWF Directive contained no express mention of product placement in either its 1989 or its 1997 versions.
- 8 Article 10(1) of the TVWF Directive. In 2005, the Commission noted that ‘the dual requirement of identification and separation implicitly has the effect of not authorising, within the current legal framework, recourse to product placement in programmes produced by broadcasters covered by the TWF Directive’ (<ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/ispa_advert_en.pdf>, at p 4).
- 9 The Commission estimated that ‘product placement, in particular, could generate substantial additional resources for the audiovisual value-chain, starting from linear service providers. On the grounds of data referring to the US market and statistics from the European Audiovisual Observatory, estimations indicate that such resources could amount to €500m’: Impact Assessment of the Commission’s Proposal of December 2005, COM(2005) 646 final, at para 3.2.4. One cannot help but notice, however, the lack of precision of the figures put forward, both in terms of their geographical scope and the time period they cover.
- 10 The consultation documents are available at: <ec.europa.eu/avpolicy/reg/history/consult/index_en.htm>. The European Parliament argued in favour of prohibiting unduly prominent placement as well as informing viewers of the presence of product placement in programmes. For the legislative history of the AVMS Directive, see: <ec.europa.eu/avpolicy/reg/history/codecision/index_en.htm>.
- 11 Directive 2007/65, OJ 2007 L332/27. The Commission then proposed to codify the AVMS Directive, and a new Directive was adopted to this effect in March 2010: Directive 2010/13, OJ 2010 L95/1.
- 12 Even though art 11 applies equally to both on-demand and scheduled audiovisual media services, this article focuses exclusively on the rules applicable to television broadcasting (scheduled services). For more information on the AVMS Directive (in English), see A Harcourt and S Weatherill (eds), ‘Special Issue on the Consumer and EU Audiovisual Policy’, *Journal of Consumer Policy* (2008) 31; O Castendyk, E Dommering and A Scheuer, *European Media Law* (The Hague: Kluwer Law International, 2008); J Harrison and L Woods, *European Broadcasting Law and Policy* (Cambridge: Cambridge University Press, 2007); I Katsirea, *Public Broadcasting Standards and European Law* (The Hague: Kluwer Law International, 2008); M Burri-Nenova, ‘The New Audiovisual Media Services Directive: Television Without Frontiers, Television Without Cultural Diversity’, *CMLRev* 44 (2007) 1689.
- 13 Article 11(2) provides that ‘product placement shall be prohibited’.
- 14 Article 11(3) provides a list of programmes in which product placement may be used (except if Member States decide otherwise), as well as a list of the minimum requirements any programme containing product placement shall meet. For a discussion of the programmes in which product placement may be allowed and the requirements which must be complied with, see s II(ii) below.
- 15 O Castendyk, E Dommering and A. Scheuer, *European Media Law* (The Hague: Kluwer Law International, 2008), at p 912.

16 The 2008 consultation document is available at: <webarchive.nationalarchives.gov.uk/20100512144753/http://www.culture.gov.uk/images/consultations/AVMS_Consultation_Document.pdf>.

17 Andrew Burnham's statement to the House of Commons (March 18 2009) is available at: <www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm090318/text/90318w0003.htm>.

18 <webarchive.nationalarchives.gov.uk/20100407120701/http://www.culture.gov.uk/images/consultations/Consultation_productplacement.pdf>, at para 6.

19 The consultation ran from November 26, 2009 to January 9, 2010, and therefore included the Christmas festive season. The AVMS Directive had to be implemented in all Member States by December 19, 2010.

20 To the 178 responses, one should add the 1250 emails sent to support the continued prohibition of product placement on television and the 50 messages sent via Members of Parliament. The consultation also received remarkable media coverage. For a summary report of the consultation, see: <www.google.co.uk/url?sa=t&source=web&cd=1&ved=0CBsQFjAA&url=http%3A%2F%2Fwebarchive.nationalarchives.gov.uk%2F%2B%2Fhttp%3A%2Fwww.culture.gov.uk%2Fimages%2Fconsultation_responses%2FConsultation_Report_final.pdf&ei=2Cn6TZvuKca3hAf29aHHCw&usg=AFQjCNH_Lr1RMYJoH3yTQYQGQSVkNoQCFA>.

21 SI 2010/831, accompanied by an Explanatory Memorandum with an Impact Assessment in annex. The Regulations amend the 2003 Communications Act (2003 c 21).

22 The Guidance is not binding, as explicitly confirmed at para 1.1. The Code and the Guidance are available at: <stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/commercial-references-television/>.

23 As discussed in s 3 below, this possibility is subject to the 'State of establishment' principle.

24 Article 1(1)(m) of the AVMS Directive.

25 Different methods have been proposed to determine whether value is 'significant'. One may have regard to the budget of the production: for example, Castendyk *et al* consider a prop with a value of under 1% of the budget as insignificant: O Castendyk, E Dommering and A Scheuer, *European Media Law* (The Hague: Kluwer Law International, 2008), at p 913. Alternatively, one may set a given threshold beyond which value is deemed to be significant: for example, Austria considers that any prop of more than €1,000 is of significant value: see C Angelopoulos, 'Product Placement in European Audiovisual Productions', in *Product Placement* (European Audiovisual Observatory, 2010), at p 11.

26 Note, however, that prop placement must comply with other relevant Code rules, and in particular rr 9.1 to 9.5. An interesting point of interpretation arises as a result of the provision in the AVMS Directive that 'product placement shall be admissible where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme' (art 11(2)). One may indeed wonder why the AVMS Directive specifies that when there is no payment but only the provision of certain goods or services free of charge the prohibition on product placement does not apply. This seems to bring more confusion than clarity, insofar as remuneration is a defining characteristic of product placement and, in its absence, there can be no product placement within the meaning of art 1(1)(m) of the AVMS Directive.

27 The distinction between product placement and prop placement for the purposes of UK implementing rules is discussed at paras 1.43 to 1.51 of the Guidance.

28 Ofcom Broadcast Bulletin, Issue 158, May 24, 2010, available at: <www.ofcom.org.uk/tv/obb/prog_cb/obb158/Issue158.pdf>, at p 22.

29 C Angelopoulos, 'Product Placement in European Audiovisual Productions', in *Product Placement* (European Audiovisual Observatory, 2010), at p 19.

30 For more information on the definition of the different genres, see O Castendyk and N Ulrich, 'Article 11 TWFD', in O Castendyk, E Dommering and A Scheuer, *European Media Law* (The Hague: Kluwer Law International, 2008), at p 523. Oliver Castendyk has commented that this list does not include serials, even though serials are specifically mentioned in relation to television advertising as a distinguishable genre from series (see art 20(2)). He argues that there is no reason for banning product placements in serials if they are accepted in series and that, by way of analogy, serials should be included in the list of possible productions with product placements or, alternatively, subsumed under the term 'light entertainment programme': at p 913 of the opus cited. This is the view Ofcom has taken in its Guidance: 'the term series comprises a group of programmes in which the editorial content is clearly linked. For example, a series encompassing a story, theme or narrative that develops across episodes, with the appearance of regular characters/presenters. In this context "series" includes serials such as sopas' (at point 1.63).

31 The structure of the Directive suggests that the option granted to Member States is limited to the list and that if a programme is not listed, the prohibition must be maintained. The fact that art 10 explicitly bans the sponsorship of news and current affairs programmes seems to reinforce this interpretation. However, the list contained in art 11 encapsulates a broad range of programmes, which raises doubts about the practical significance of the statement of principle banning product placement this article begins with.

32 The Regulations amend the 2003 Communications Act to this effect, as reflected by s 9 of the Code.

33 Rule 9.12. The rule specifies that a current affairs programme is one that contains explanation and/or analysis of current events and issues, including material dealing with political or industrial controversy or with current public policy.

34 See s 3 below on the State of establishment principle. Under UK rules, a programme is produced under UK jurisdiction if it is produced or commissioned by either: the provider of the television programme service or any person connected with that provider (except in the case of a film made for cinema); or any other person with a view to its first showing taking place in a television programme service under the jurisdiction of the UK (for the purposes of the AVMS Directive).

35 Children's programmes could indeed fall within the broad definition of the notion of 'series'.

36 See Sched 11A, para 3(2), of the Communication Act 2003, as amended by the Regulations.

37 On 26 July 2010, Ofcom stated that 'adult airtime accounted for 67.2% of children's viewing in 2009. For 4-9 year olds, the figure was lower at 54.4% and higher for 10-15 year olds at 79.8%': <stakeholders.ofcom.org.uk/market-data-research/tv-research/hfss-final-review/>, at para 4.14.

38 A watershed of 9 pm, before which there should be no product placement in UK programmes, would arguably be the easiest solution to enforce, and the most effective from a child protection point of view.

39 'Product placement shall be admissible where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme'. In fact, one wonders why the EU legislature felt that this precision was necessary, as the definition of product placement excludes, in any event, prop placement from its scope. As discussed above, one of the key defining features of product placement is the payment of consideration of significant value.

40 L Woods, 'The Consumer and Advertising Regulation in the Television Without Frontiers and Audiovisual Media Services Directives', *Journal of Consumer Policy* 31 (2008) 63, at p 72.

41 Ibid.

42 On the regulation of food marketing to children, see A Garde, *EU Law and Obesity Prevention* (The Hague: Kluwer Law International, 2010), ch 5.

43 The Editorial Policy Guidance Note on Product Placement in BBC Licence Fee Funded Television Services is available at: <www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-product-placement>.

44 This rule is a specific implementation of the more general rule laid down in r 9.1 that 'broadcasters must maintain independent editorial control over programming'.

45 See Ofcom's Guidance, at paras 1.78 to 1.81.

46 O Castendyk, E Dommering and A Scheuer, *European Media Law* (The Hague: Kluwer Law International, 2008), at p 916.

47 See also rule 9.4: 'Products, services and trade marks must not be promoted in programming.' The Guidance Ofcom has published confirms that UK rules are somewhat more restrictive than art 11 of the AVMS Directive mandates: a breach of the rule is likely to occur where a clear promotional statement about a placed product is made or where repeated implicit promotional content is broadcast. Implicit promotions are also targeted, for example when a character is, or a range of characters are, shown repeatedly using the same placed product.

48 At para 1.83.

49 Ofcom Broadcast Bulletin, Issue 169, November 8, 2010, available at: <stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>, at p 26. Even though this decision concerned a sponsored programme, rather than a programme containing product placement, the analogy suggests that Ofcom adopts a broad interpretation of the notion of 'promotional references'.

50 Ofcom Guidance, at para 1.94.

51 Ofcom Broadcast Bulletin, Issue 102, February 11, 2008, available at: <www.ofcom.org.uk/tv/obb/prog_cb/obb102/issue102.pdf>, at p 8. This decision remains relevant following the liberalisation of product placement, as unduly prominent placement is still prohibited.

52 For a discussion relating to the geographical scope of art 11 of the AVMS Directive, see C Angelopoulos, 'Product Placement in European Audiovisual Productions', in *Product Placement* (European Audiovisual Observatory, 2010), at p 19.

53 See Ofcom's note under r 9.8.

54 Ofcom's Guidance, at para 1.81.

55 Article 11(3)(d).

56 The text of the consultation and the contributions Ofcom has received are available at: <stakeholders.ofcom.org.uk/consultations/bcrtv2010/>.

57 See Annex I of the Guidance.

58 On the need for a neutral logo, see C Angelopoulos, 'Product Placement in European Audiovisual Productions', in *Product Placement* (European Audiovisual Observatory, 2010), at p 16.

59 At para 1.123.

60 Such programmes must however comply with any other relevant Code rules. See the note under r 9.14. In particular, there shall be no placement for prohibited products, services or trade marks, as discussed below.

61 Article 11(3)(d).

62 Article 19(1): 'Television advertising and teleshopping shall be readily

recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.'

63 This is reflected in Recital 81 of the AVMS Directive, according to which 'the principle of separation should be limited to television advertising and teleshopping, and product placement should be allowed under certain circumstances, unless a Member State decides otherwise. However, where product placement is surreptitious, it should be prohibited. The principle of separation should not prevent the use of new advertising techniques.' On the move from the separation to the identification principle, see C Angelopoulos, 'Product Placement in European Audiovisual Productions', in *Product Placement* (European Audiovisual Observatory, 2010), at p 10.

64 Article 1(1)(j) of the AVMS Directive.

65 Article 9(1) of the AVMS Directive provides that 'audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited'. Recital 90 adds: 'surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement. This can be done by signalling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.'

66 Case C-52/10 *Eleftheri tileorasi and Giannikos*, judgment of June 9, 2011, not yet reported (available at <www.curia.eu.eu>).

67 At para 32.

68 At para 33.

69 This is explicitly confirmed by Ofcom's Guidance, at para 1.52.

70 This requirement is a specific application of the requirement laid down in art 9(1)(d) that 'all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited'.

71 Article 11(4). This prohibition applies to all programmes, notwithstanding whether they have been produced or commissioned by the broadcaster. Article 11(4) is a specific application of the requirements laid down in art 9(1)(d) and (f) banning all forms of audiovisual commercial communications (including product placement) for these two categories of products.

72 Article 9(1)(e).

73 Article 9(2). For a criticism of this provision, see A Garde, *EU Law and Obesity Prevention* (The Hague: Kluwer Law International, 2010), at p 193.

74 Rule 9.13 should be read in light of paras 1.109 to 1.116 of the Guidance.

75 This is largely due to the wide participation of public society to the Government's second consultation of November 2009.

76 This is confirmed by the Guidance at para 1.116 and is all the more regrettable in terms of consumer protection, as the products listed in r 9.13 are unlikely to be of 'significant value' (as discussed above).

77 Article 4(1) of the AVMS Directive provides that 'Member States shall remain

free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law'.

78 The State of establishment principle is also sometimes referred to as the transmitting State principle or the country of origin principle.

79 Article 3(1) of the AVMS Directive requires that 'Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive'. The criteria relied upon to determine the State of establishment are listed in art 2(3) and (4). On the State of establishment principle and its relationship to the minimum harmonisation clause, see O Castendyk, E Dommering and A Scheuer, *European Media Law* (The Hague: Kluwer Law International, 2008), at pp 337 to 406, and A. Herold, 'Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer's Friend or Foe?', *Journal of Consumer Policy* 31 (2008) 5.

80 The AVMS Directive is based on arts 53(1) and 62 of the Treaty on the Functioning of the European Union.

81 In Case C-34/95 *De Agostini* [1997] ECR I-3843 which involved the compatibility with the TVWF Directive of the Swedish ban on advertising designed to attract the attention of children of less than 12 years old, the ECJ explicitly confirmed that the State of establishment principle required that Member States were bound to accept broadcasts from other Member States, without having the possibility to apply the stricter national standards which they may impose on the broadcasters established on their territories.

82 This is required by art 2(1) of the AVMS Directive: 'Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.'

83 In particular, the Government noted: '7. Under the new AVMS Directive, a majority of Member States will allow product placement in the permitted genres of programmes (cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes). Others will permit product placement (in all of these genres) for their non-public service commercial broadcasters only. 8. Very few Member States are expected to persist with a full prohibition. Member States which have allowed or will allow product placement include Italy, Spain, and Poland. 9. The issue of product placement is still under active discussion in both France and Germany, but it seems likely that both of these jurisdictions will move to a position in which some product placement is permitted, at least for fully commercial television broadcasters.' (<webarchive.nationalarchives.gov.uk/20100407120701/http://www.culture.gov.uk/images/consultations/Consultation_productplacement.pdf>, at pp 8 and 9).

84 For an overview of how art 11 of the AVMS Directive has been implemented in other EU Member States, see *Product Placement* (European Audiovisual Observatory, 2010).